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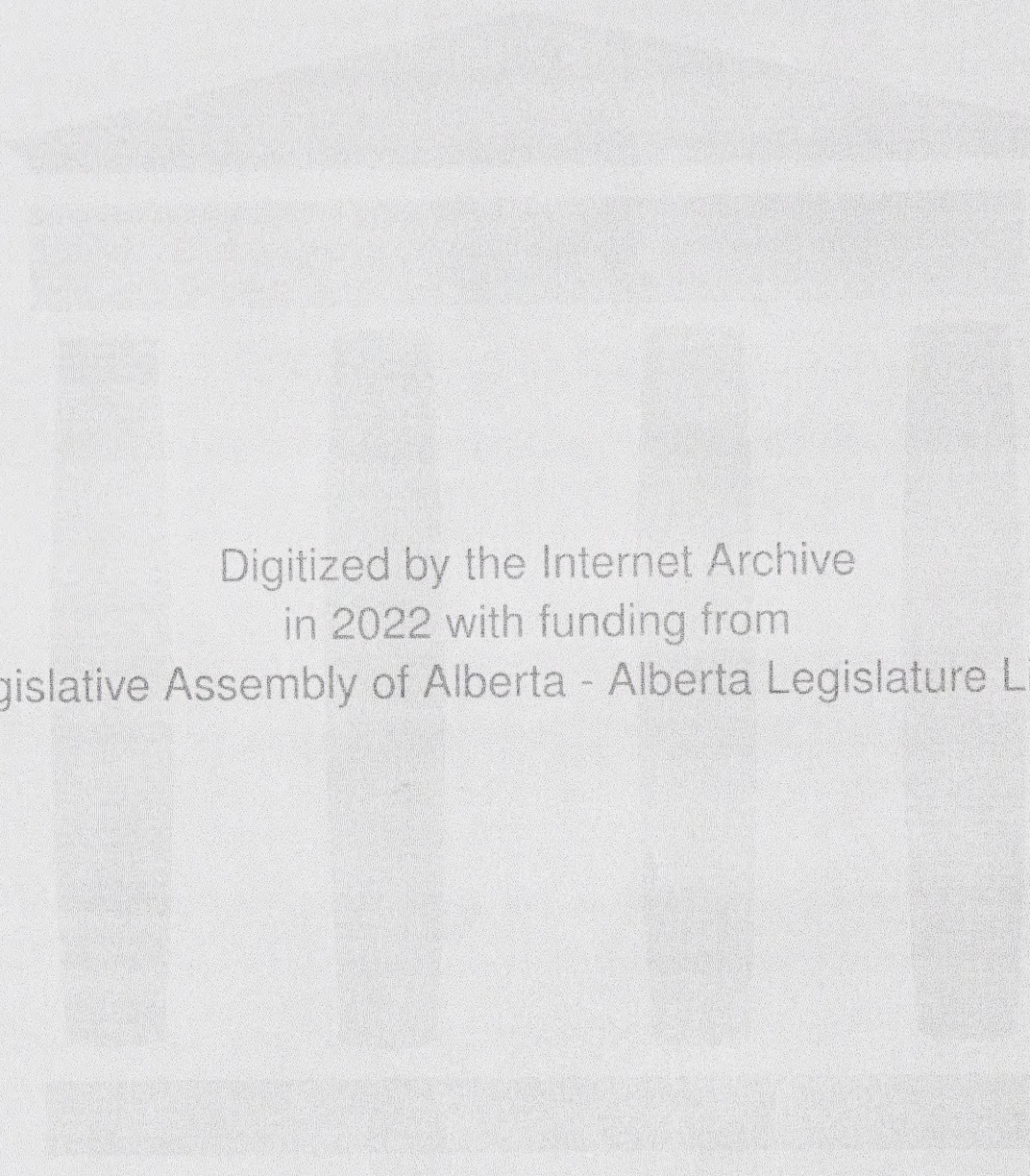
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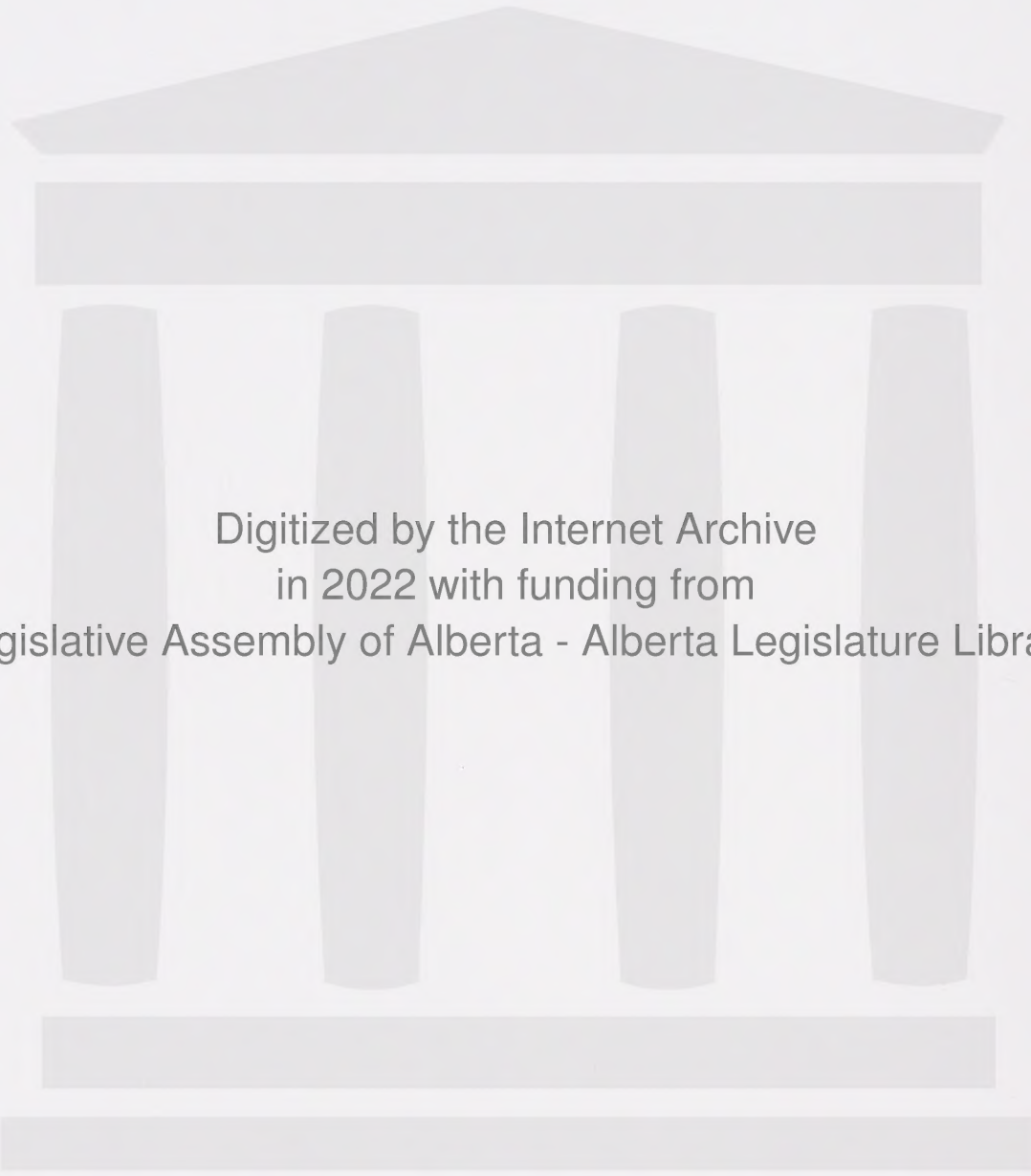
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IN THE MATTER OF THE PUBLIC
INQUIRIES ACT
AND
IN THE MATTER OF A COMMISSION, DATED THE
12TH DAY OF OCTOBER, A.D. 1938, TO INQUIRE
INTO MATTERS CONNECTED WITH PETROLEUM
AND PETROLEUM PRODUCTS

SUBMISSION



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88 Hawley

IN THE PROVINCE OF ALBERTA
IN THE MATTER OF THE PUBLIC INQUIRIES ACT

-and-

IN THE MATTER OF A Commission, dated the 12th
day of October, A.D. 1938, to inquire into
matters connected with Petroleum and Petroleum
Products,

COMMISSIONERS:

The Hon. Mr. Justice McGillivray
(Chairman)

-and-

L. R. Lipsett, Esq.,

AUTHORITIES SUBMITTED BY COUNSEL FOR
ROYALITE OIL COMPANY LIMITED

BENNETT, HANNAH, NOLAN, CHAMBERS & MIGHT
BARRISTERS, SOLICITORS
CALGARY - CANADA

EJC/HC.

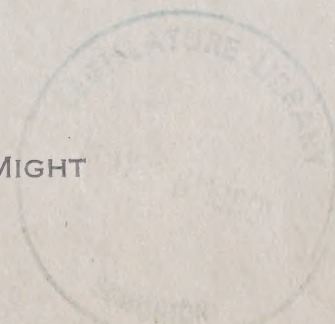


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THE ROYALITE OIL COMPANY LIMITED.

ROYAL COMMISSION AS TO PIPE LINE
RATES.

(1)

THE PIPE LINE ACT,

1925 - ch. 62 as amended.

Section 9:

"(1) The Board of Public Utility Commissioners may make regulations and orders.....

(f) fixing the rates for carriage through any pipe line.....

(2) In making any such regulations the Board of Public Utility Commissioners may rely upon technical advice and may consult with operators of pipe lines in order that the regulations may be as effective as possible, and impose as little hardship as possible upon individuals."

Section 10b:

"This Act shall apply to all pipe lines whether constructed before or after the passing of this Act, but no company having constructed, or operating, a pipe line prior to the last day of March, one thousand nine hundred and twenty-six, shall be required to apply for the permit or declaratory order hereinbefore provided for, but any other company may make an application to the Board of Public Utility Commissioners and thereupon the said Board shall have power to make any order which it is hereinbefore given power to make."

(11)

PROFITS OR SURPLUS ACQUIRED OR BUILT UP PRIOR TO RATE REGULATION
ARE NOT A FACTOR IN NEW RATE.

Whitten - Wilcox -

Valuation of Public Service Corporations (1928) 2nd ed. at pages
694 and 695:

"Coupled with this goes the rule that rates in the past which were unchallenged, or if challenged were approved by the proper authorities, must now be assumed to have been reasonable, or at most not so unreasonable as to give the consumers a right of action against the utility to recover any part of them. And from this it follows that whatever the utilities have collected in the past under unchallenged or approved rates, over and above the full cost of operation, became their property without any strings attached to it, which they were free to use as they saw fit within the limitations placed upon the use of all private property."

Board of Public Utility Commissioners

v.

New York Telephone Company (1926) 271 U.S. 23.

Mr. Justice Butler (delivering the judgment of the Court) at pages
30 and 31:

"It may be assumed, as found by the board, that in prior years the Company charged excessive amounts to depreciation expense and so created in the reserve account balances greater than required adequately to maintain the property. It remains to be considered whether the Company may be compelled to apply any part of the property or money represented by such balances to overcome deficits in present or future earnings and to sustain rates which could not otherwise be sustained."

and at pages 31 and 32:

"Past losses cannot be used to enhance the value of the property or to support a claim that rates for the future are confiscatory And the law does not require the company to give up for the benefit of future subscribers any part of its accumulations from past operations. Profits of the past cannot be used to sustain confiscatory rates for the future....."

Property paid for out of moneys received for service belongs to the Company just as does that purchased out of proceeds of its bonds and stock. It is conceded that the exchange rates complained of are not sufficient to yield a just return after paying taxes and operating expenses, including a proper allowance for current depreciation. The property or money of the company represented by the credit balance in the reserve for depreciation cannot be

"used to make up the deficiency."

Willcox et al v. Consolidated Gas Co. of N.Y.
(1909) 212 U.S. 19,
53 L. ed. 382.

Mr. Justice Peckham at page 399 of L. ed. states:

"And we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding rates. If the property which legally enters into the consideration of the question of rates has increased in value since it was acquired, the company is entitled to the benefit of such increase."

Knoxville v. Knoxville Water Co.
(1908) 212 U.S. 1
53 L. ed. 371.

Mr. Justice Moody, who delivered the judgment of the Court, at page 380 of L. ed. refers to the fact that it is the Company's duty to provide for current depreciation and repairs and then goes on to say:

"If, however, a company fails to perform this plain duty and fails to exact sufficient returns to keep the investment unimpaired, whether this is the result of unwarranted dividends upon overissues of securities, or of omission to exact proper prices for the output, the fault is its own. When, therefore, a public regulation of its prices comes under question, the true value of the property then employed for the purpose of earning a return cannot be enhanced by a consideration of the errors in management which have been committed in the past."

See to the same effect:

Galveston Electric Co. v. Galveston
(1922) 258 U.S. 388 at 395,
66 L. Ed. 678 at 683.

Newton v. N.Y. & Queens Gas Co.
(1922) 258 U.S. 165 at 175,
66 L. Ed. 538 at 548.

In Lincoln Gas & Electric Co. v. Lincoln
(1919) 250 U.S. 256,
63 L. ed. 968,

Mr. Justice Pitney, at page 976 of L. ed. in delivering the

judgment of the Court, states:

"Again, we question the propriety of the Master's treatment of 'going value' which he seems to have estimated at less than he would otherwise have placed it, upon the theory that the company's business had been developed at the expense of the public, in the expenditure of past earnings exceeding a fair return upon the capital invested, and this without any finding, or any clear evidence to which our attention has been called, that past earnings were excessive."

Simpson v. Shepherd,
(1913) 230 U.S. 352,
57 L. ed. 1511.

Mr. Justice Hughes, who delivered the judgment of the Court, at page 1564 of L. ed., states:

"It is clear that in ascertaining the present value we are not limited to the consideration of the amount of the actual investment. If that has been reckless or improvident, losses may be sustained which the community does not underwrite. As the company may not be protected in its actual investment, if the value of the property be plainly less, so the making of a just return for the use of the property involves the recognition of its fair value if it be more than cost. The property is held in private ownership, and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law."

Los Angeles Gas & El. Corp. v. Rd. Commission of California,
(1933) 289 U.S. 287,
77 L. ed. 1180,

Chief Justice Hughes, at page 1197 L. ed:

"Deficits in the past do not afford a legal basis for invalidating rates, otherwise compensatory, any more than past profits can be used to sustain confiscatory rates for the future."

Indranatuli water case
47 Dip & Rep 144
1427A pu R 15 at 24
actual cost - good evidence of
value

(111)

FOR PURPOSE OF FIXING RATE BASE THE VALUE OF THE PLANT IS TO
BE TAKEN AS AT DATE OF HEARING.

Willcox v. Consolidated Gas Co.

212 U.S. 19,
53 L. ed. 382.

Mr. Justice Peckham, at page 395 of L. ed:

"In order to determine the rate of return upon the reasonable value of the property at the time it is being used for the public, it, of course, becomes necessary to ascertain what that value is."

And at page 399:

"And we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property which legally enters into the consideration of the question of rates has increased in value since it was acquired, the company is entitled to the benefit of such increase."

Simpson v. Shepherd,
230 U.S. 352,
57 L. ed. 1511.

Mr. Justice Hughes, at page 1564 of L. ed:

"As the company may not be protected in its actual investment, if the value of its property be plainly less, so the making of a just return for the use of the property involves the recognition of its fair value if it be more than its cost. The property is held in private ownership, and it is that property and not the original cost of it, of which the owner may not be deprived without due process of law."

Fraser et al v. Fraserville,
(1917) 86 L.J. P.C. 91.

In ascertaining the value of property expropriated, the value to be ascertained is the value to the seller in its actual condition at the time of expropriation.

The relative statute provided:

"If there be no agreement between the parties, the value of the immovable in question, together with whatever goes in compensation of the value of such immovable, shall be estimated by arbitrators....."

Lord Buckmaster, at page 94, refers to various decisions and states that the substance of them is as follows:

"That the value to be ascertained is the value to the seller of the property in its actual condition at the time of the expropriation, with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired....."

Cedar Rapids Mfg. Co. v. Lacoste et al.,
(1914) 83 L.J. P.C. 162,

Lord Dunedin, at page 166:

"The law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the law of England, and it has been explained in numerous cases....."

.....
"For the present purpose it may be sufficient to state two brief propositions; First, the value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker, Secondly, the value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages which falls to be determined."

In West v. Chesapeake etc. Telephone Co.
(1935) 295 U.S. 662,
79 L. ed. 1640,

the United States Supreme Court held that the rate to be fixed must provide a reasonable rate of return upon the value of the property at the time of the taking.

Toronto Ry Case

Held, arbitrators had rightly taken the cost of reproduction less depreciation as a guide in making their award, and that as they had also taken into account obsolescence, comparative utility and other relevant considerations, the above contention by the city (i.e. that arbitrators should have determined first whether a reasonable person would have reproduced the particular assets as part of a railway system in Toronto at the date of arbitration, first, scrap value) failed.

(1V)

HOW SHOULD PRESENT VALUE BE ARRIVED AT?

Toronto City v. Toronto Railway, (Viscount Cave)

(1925) 94 L.J. P.C. 25,

1125 AC 177

The City of Toronto, acting under statutory powers, took over, as from a fixed date, a system of street railways worked by the Company, at a price to be settled by arbitration.

The Judicial Committee of the Privy Council held that, in valuing the rolling stock, buildings and track, the arbitrators were right in valuing the property at what it would cost to reproduce it less depreciation, and in estimating the cost of reproduction on the basis of the prices of labor and materials current at the date of the valuation, and should not have taken into account the prices current during the period which it would have taken the City to construct a railway to be ready for use at the date of the transfer.

International Ry. Co. v. Niagara Parks Commission,

(1937) 3 All. E.R. 181 (P.C.)

By an agreement made in 1891, confirmed by statute, the Company was given the exclusive right to construct and operate an electric railway for 40 years.

The agreement provided that on its determination the Company was to be duly compensated.

"for their railways, equipment, machinery, and other works.....but not in respect of any franchises for holding or operating the same,"

the compensation to be fixed by mutual agreement, or, in case of difference, by arbitration.

The Judicial Committee held that, even though the railway had not been a commercial success, the proper basis of the compensation was the cost of reconstruction, less depreciation.

Lord Macmillan, at page 188, refers to the fact that the Company had maintained and operated the railway complete with equipment, machinery and works, up to the recapture date, as it was bound to do, and he states:

"That for which it is to be duly compensated is the same thing as that which it was bound to hand over, namely, its railway, with its equipment, machinery and other works, a going concern, and not a mere collection of materials."

Even though the railway was a losing proposition His Lordship at page 188 states this was no justification for the arbitrators fixing a break-up value, being the value to the taker, because it could not earn profits in the future.

He states at pages 188 and 189:

"Their Lordships know of no instance in which compensation, payable by the transferee of a public utility undertaking, as a going concern, to the transferor, has been fixed at the break-up value to the transferee, and they find no indication of any such intention in the documents before them. It would require very clear language indeed to lead to such a result..... A result so contrary to practice and doctrine would require, for its justification, the clearest directions in the terms of transfer."

"With all respect to the judges of the Court of Appeal and the majority arbitrators, it would appear that they have allowed themselves, in construing the terms of transfer, to be unduly influenced by the unfortunate financial experience of the Company. But the interpretation of the terms of transfer cannot be affected by the events that have happened.....Let it be assumed that, instead of being a financial disaster, it had been highly prosperous. In that, according to the reading of the terms of transfer adopted below, the compensation payable by the Parks Commissioners would have had to have regard to the large profits which the company was earning, and the Parks Commissioners would have had to compensate the company, not for the value of the railway as a structure, but for the loss of the profits which it was making by it."

.....

"It is these considerations which, in their Lordships' view, render it erroneous in principle to have regard to profits earned or losses sustained when what is in question.....is the compensation to be paid to a private undertaker at the expiry of its limited franchise for the physical structure which it has created....."

niagara case

p 146 - Case was limited to a
consideration of application of two methods
only: scrap value and reconstruction
cost less depreciation

read

p 186: " - - - - -

187 but the value are to be
found principles etc "

The Judicial Committee held that the valuation by the minority arbitrators on the basis of reconstruction cost, less depreciation, was the proper basis.

The agreement expressly excluded compensation for franchises.

Edinburgh St. Tramways Co. v. Edinburgh Corporation
(1894) A.C. 456 (H. of L.) (Lord Herschell)

The Court approved the following basis adopted by the arbitrators:

"Such sum as it would cost to construct and establish the same, under deduction of a proper sum for depreciation to their present condition, and that, in estimating such cost, I am entitled to take into account the fact that said tramways are now successfully constructed and in complete working condition."

Oldham Ashton etc., Tramway v. Ashton Corporation,
(1921) 90 L.J.K.B. 828 (C.A.)

Section 43 of the Tramways Act enabled the municipality on six months' notice at the end of twenty-one years or of every seven years thereafter to take over the undertaking of the Company upon the terms of paying "the then value (exclusive of any allowance for past or future profits, or any compensation for compulsory sale).

It was admitted by both parties that the basis of valuation was what it would cost at the date of the sale to construct the lines subject to a deduction for depreciation, and that rental value should not be taken into account.

The Court, inter alia, held:

- (1) Engineers' fees for construction should be allowed, subject to depreciation.
- (2) Interest on capital during construction should be allowed to depreciation.

1921, 1 KB 269
" 3 KB 511
nature of
depreciation
not indicated

Denver v. Denver Union Water Company,
(1918) 246 U.S. 178,
62 L. ed. 649.

Mr. Justice Pitney, who delivered the judgment of the Court,

at page 661 of L. ed. states:

" In this situation there can be no question of the company's right to adequate compensation for the use of its property employed, and necessarily employed, in the public service; nor can it be doubted that the property must be valued as property in use. It involves a practical contradiction of terms to say that property useful and actually used in a public service is not to be estimated as having the value of property in use, but is to be reckoned with on the basis of its 'junk value'. Nor is the question of value for present purposes greatly affected, if at all, by the fact that there is neither right nor obligation to continue the use perpetually, or for any long period that may be defined in advance. The reason is not obscure: the cost and detriment to a property owner attributable to the use of his property by the public, and the value of the service rendered by the property to the public, are measured day by day, month by month, year by year, and are little influenced by the question how long the service is to continue. The cost of the service includes the use of the plant, but, ordinarily, not its destruction, except through the slow processes of wear and tear and obsolescence, for which graduated depreciation allowances are made. The whole calculation is a matter of income, not capital, accounting; and the cost and value of the use of a given property for a stated period is the same whether the use is to be continued after the expiration of the period or not. If the period is extended, compensation for the use is extended proportionately.

What we have said establishes the propriety of estimating complainant's property on the basis of present market values as to land, and reproduction cost, less depreciation, as to structures. That this method was fairly applied by the special master hardly is disputed by appellants, except as they contest the items allowed for 'go-in-concern value' and for the water rights acquired by complainant and its predecessors by original appropriation."

As to 'go-in-concern value' Mr. Justice Pitney refers to the judgment of the Court in,

Des Moines Gas Co. v. Des Moines (1915)

238 U.S. 153,
39 L. ed 1244,

where Mr. Justice Day speaking for the Court, at page 1251 of L. ed.,

states:

" 'Going value; or 'going concern value', i.e., the value which inheres in a plant where its business is established, as distinguished from one which has yet to establish its business, has been the subject of much discussion in rate making cases before the courts and commissions. Many of those cases are collected in Whitten on 'Valuation of Public Service Corporations' That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, is self-evident.. This element of value is a property right, and should be considered in determining the value of the property, upon which the owner has a right to make a fair return when the same is privately owned although dedicated to public use."

And at the same page he states:

"Included in going value as usually reckoned is the investment necessary to organizing and establishing the business which is not embraced in the value of its actual physical property..... These items of expense in development are often called overhead charges, for which, as we have already seen, the master allowed 15 per cent., upon the base-value (exclusive of real estate) or \$296,254, in addition to his allowance of \$6,923 for organization expenses,"

The learned judge then quotes from the valuation report of the master (which the Court refused to disturb) as follows:

"In reaching the physical value of the plant in question by the process of reproduction, it is necessary to bear in mind that the present value thereof represents much more than the machinery therein, the labor of installing and constructing them, and putting them in place to perform their various functions, ready for the manufacture and distribution of gas to its customers. Were the city of Des Moines without such a plant, and such a one as the complainant now owns was proposed, it would be found that much more than the mere cost of labor and material would be expended. Such expenditures are termed overhead charges, and are as follows:

1. Time and money expended in the promotion of the enterprise, in the organization of the company and interesting capital therein, including, also legal expenses, obtaining the necessary franchise, as well as the costs of incorporating the company.
2. Then a competent engineer must be employed to prepare the plans and specifications for the plant, and make the necessary surveys, and when the work began, to superintend the construction thereof, and see that it is done properly and according to plans and specifications. The successful operation of

"the plant depends largely upon its proper construction.

3. Then losses arising from accidents and injuries to workmen as well as the material during its construction, which is such an amount as the cost of insuring against such losses, which is between 1 and 2 per cent.

4. Contingencies are such expenditures as arise from the lack of foresight and care preparing the plans and specifications. No matter how careful the engineer may prepare them, such expenditures invariably arise. Mr. Alvord testified that his allowance therefor would depend very much upon his knowledge of the engineer who prepared them, but that no matter who prepared them, they would invariably occur, and an allowance should be made therefor. The careful and thorough inventory in this case reduces very greatly the allowance therefor.

5. The cost of administration, which includes the time and money expended by the parties who are engaged in the enterprise, purchasing the material, procuring the money for their payment as needed, and generally superintending the enterprise during the construction of the plant.

6. It is estimated that it would take three years to complete the plant in question, and that at least one half the time and money invested therein would give no return, and that a loss of interest would result therefrom, and that such loss would be included in the overhead charges.

7. Taxes during the construction.

The latter is regarded by me as very questionable. It is in a certain sense making taxes an asset rather than a liability, and the amount is so vague and uncertain that it has been given very little consideration and weight in fixing the overhead charges. Either the money or the property should pay taxes.

It must be borne in mind that these expenditures are all made during the promotion and construction of the plant, and are necessarily a part of the cost thereof. No overhead charges that do not inhere in and add to the cost thereof should be allowed as a part of its physical value. It is not a question of what was actually expended therefor in the plant in question, but what would it cost to reproduce a similar plant at the present time. It is through this method we reach the present value of this plant new, and then when it is properly depreciated, according to the condition, life, and age of its various parts, we reach the present value of the plant in its present condition. It is not a perfect method, but it is the best method therefor, and results as nearly as possible in giving the present value of the plant. No other method known has proved so satisfactory."

See: McCardle v. Indianapolis Water Co.
(1926) 272 U.S. 400,
71 L. ed 316,

at pages 326 and 327 L ed.

Los Angeles Gas & El. Corp. v. Rd. Comm. of California.
(1933) 289 U.S. 287
77 L ed 1180,

Chief Justice Hughes at pages 1196 and 1197 L. ed. referring to
the Company's claim for a substantial allowance for "going value" states:

"This court has declared it to be self-evident that there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, and that this element of value is a property right which should be considered in determining the value of the property upon which the owner has a right to make a fair return.....The going value thus recognized is not to be confused with good will, in the sense of that element of value which inheres in the fixed and favorable consideration of customers, arising from an established and well-known and well-conducted business, which as the Court has repeatedly said, is not to be considered in determining whether rates fixed for public service corporations are confiscatory.....The concept of going value is not to be used to escape the just exercise of the regulatory power in fixing rates, and, on the other hand, that authority is not entitled to treat a living organism as nothing more than bare bones."

McCardle v. Indianapolis Water Company,
(1927A) P.U.R. 15 (United States S.C.)
272 U.S. 400; 71 L. ed. 316,

Mr. Justice Butler, speaking for the United States Supreme
Court, at page 325 L. ed., states:

"It is true that, if the tendency or trend of prices is not definitely upward or downward and it does not appear probable that there will be a substantial change of prices, then the present value of lands plus the present cost of constructing the plant, less depreciation, if any, is a fair measure of the value of the physical elements of the property.....While the values of such properties do not vary with frequent minor fluctuations in the prices of material and labor required to produce them, they are affected by and generally follow the relatively permanent levels and trends of such prices."

And at page 328 L. ed., he states:

"There is to be ascertained the value of the plant used to give the service and not the estimated cost of a different plant. Save under exceptional circumstances, the court is not required to enter upon a comparison of the merits of different systems. Such an inquiry would lead to collateral issues and investigations having only remote bearing on the fact to be found, viz., the value of the property devoted to the service of the public."

National Waterworks Co. v. Kansas City
(1894) 62 Fed. 853,
27 L.R.A. 827,

The Court stated:

"The original cost of the construction can not control, for 'original cost' and 'present value' are not equivalent terms. Nor would the mere cost of reproducing the waterworks plant be a fair test, because that does not take into account the value which flows from the established connections between the pipes and the buildings of the city. It is obvious that the mere cost of purchasing the land, constructing the buildings, putting in the machinery, and laying the pipes in the streets, - in other words, the cost of reproduction - does not give the value of the property as it is today. A completed system of water-works, such as the Company has, without a single connection between the pipes in the streets and the buildings of the city, would be a property of much less value than that system connected, as it is, with so many buildings, and earning, in consequence thereof, the money which it does earn. The fact that it is a system in operation, not only with a capacity to supply the city, but actually supplying many buildings in the city - not only with a capacity to earn, but actually earning - makes it true that 'the fair and equitable value' is something in excess of the cost of reproduction."

Note: This decision is quoted in Pond on Public Utilities 3rd ed. at pp. 617 and 618.

Omaha v. Omaha Water Company,
(1910) 218 U.S. 180.
54 L. ed. 991.

Mr. Justice Lurton, in delivering the judgment of the Court, at page 1000 L. ed. states:

"The option to purchase excluded any value on account of un-expired franchise; but it did not limit the value to the bare bones of the plant, its physical properties, such as its lands, its machinery, its water pipes or settling reservoirs, nor to what it would take to reproduce each of its physical features. The value in equity and justice must include whatever is contributed by the fact of the connection of the items making a complete and operating plant. The difference between a dead plant and a live one is a real value, and is independent of any franchise to go on, or any mere good will as between such a plant and its customers."

See also:

People v. Wilcox, (1914) 210 N.Y. 479,
104 N.E. 911,
51 L.R.A. (N.S.) 1.

See Viscount Cave at p29 of report
quoting from decision of arbitrators
as to what they took into account
as "depreciation".

In London v. Kansas Ct. of Industrial Relations,
(1921A) P.U.R. 807,

the Court held that original cost, less theoretical accrued depreciation, was not a proper standard to adopt as the "controlling basis" of valuation.

In Re East St. Louis Ry. Company,
(1919 D) P.U.R. 24.

the Company was held entitled to earn a fair return upon the value of property received in the form of donations, gifts or similar means.

City of Toronto v. Toronto Ry.
1925) 94 L.J.P.C. 25.

The City urged that, having regard to the fact that the price was to be the value to the City at the time of the taking, the arbitrators should have first considered whether, having regard to size, suitability, location and other factors, a reasonable person would reproduce these assets as part of a Toronto railway system in 1921, and if not, to value them on the basis of what they would fetch or if no sale were possible, then on a "scrap basis."

Viscount Cave, speaking for the Court, rejected this contention and in approving the arbitrators' valuation in this regard, he says at page 32:

"No doubt they took reproduction cost less depreciation as affording a serviceable guide in valuing the track, rolling stock and buildings; and in this they were fully justified by the authorities cited. Indeed it is difficult to see how such items as fixed plant in situ, car-barns, car-construction and repair shops, sub-stations and the machinery which they contain, could have been valued except with the assistance of some such principle. But the arbitrators were careful to make it clear that they had by no means adopted reproduction cost less depreciation as the only and sufficient test of value. In valuing the track and other plant in situ, they allowed.....not only for wear and tear, but for 'obsolescence' and had regard to good practice in railway administration and to section 4, subsection 4 of the Act (value to the City) and also to comparative utility, and other relevant consideration. So,

depreciation

Pelertoro Case at 12-13

"in valuing rolling stock, they gave due weight to character, obsolescence, and alleged defects and advantages from the operating standpoint; and with regard to buildings, suitability and other matters bearing upon their value were plainly not neglected.... it will appear that they not only proceeded on lines which had been approved by many decisions of the House of Lords and of this Board, but gave due weight to the special provisions of the Act of 1892 and to all the circumstances of the case."

The Court approved the inclusion of the head office of the Company as an item "necessary to be used in connection with the working of the railway."

In The City of Peterborough and Peterborough Electric etc. Ry.
(1916) 52 O.L.R. 9.,

The City charter empowered the City, without the Company's consent to acquire, take possession of, expropriate and use

"all poles, wires....used or operated.....for distributing electric power or energy to the customers of the company,"

with certain specified exceptions, and that upon such acquisitions and payment therefor, all rights, privileges and franchises of the Company or to the use of the streets should be at an end.

The Act specifically provided that in determining the compensation no account should be taken or allowed for prospective profits or for loss of franchise or for severance damage and that in default of agreement as to price the compensation should be determined by arbitration.

The majority of the Ontario Appellate Division, after referring to the fact that the statute specifically excluded any allowance for franchise value, severance damage, profits or compulsory taking, found that the property was to be valued in situ as tangible property, immediately available for use and operation as a going concern.

It is also to be noted that, even on this basis, Mr. Justice Masten was of the opinion that the company was entitled to include, as items of value, engineering, legal and organization expenses and insurance and interest during construction.

Ohio Utilities Company v. Public Utilities Commission,
(1925) 267 U.S. 359,
69 L. ed. 656,

Mr. Justice Sutherland, speaking for the Court, at pages
658 and 659 L. ed. states:

"Reproduction value, however, is not a matter of outlay, but of estimate, and should include a reasonable allowance for organization and other overhead charges that necessarily would be incurred in reproducing the utility. In estimating what reasonably would be required for such purposes, proof of actual expenditures originally made, while it would be helpful, is not indispensable. The Commission's chief engineer, explaining the appearance of the item in his report, called attention to the account system prescribed by the Commission, which, among other things, provided that under the head of 'organization' was included incorporation fees paid to the Government and other fees and expenses incident to organizing the utility and placing it in readiness to do business, attorneys' fees, cost of preparing and issuing certificates of stock, etc., etc., and testified that the item was an estimate made as the result of an investigation by the Commission's engineer on the spot. There was no testimony to the contrary; and the company, in view of the concession, evidently deemed it unnecessary to produce evidence upon the point. That such expenditures in a substantial amount would necessarily be made in reproducing the utility is clear; it is not suggested that the estimate of the engineers is excessive or unfairly made; and the rejection of the entire amount cannot be regarded as otherwise than arbitrary."

In Des Moines Gas Co. v. City of Des Moines,
(1915) 238 U.S. 153,

The Court affirmed the valuation of "present value of physical property" arrived at by computing "what it would cost to produce it at the present time new" which amounted to \$1,975,026, and then added for overhead charges 15% or \$296,254 and then deducted

depreciation \$333,878, leaving as the value \$1,937,482.

See Also: Whitton, vol. 2, at page 1107, where overhead of 12% was allowed in Chicago Telephone Company case for engineering, administration and legal, insurance, taxes and interest during construction.

Murray v. Public Utilities Commission,
(1916) F) L.R.A. 756 (Ida.)

Mr. Justice McCarthy, at page 759, states:

"This court is of the opinion that the rule of cost of reduction, less depreciation, adopted by the Commission, is the correct general rule or principle to be applied in this class of cases. However, we believe that, in ascertaining values in this way, the worth of a new plant of equal capacity, efficiency and durability, with proper discount for defects in the old, and the actual depreciation for use, should be the measure of value rather than the cost of exact duplication."

"So far as the question of value is concerned, we think deduction should be made only for actual, tangible depreciation, and not for theoretical depreciation, sometimes called 'accrued depreciation'. In other words, if it be demonstrated that the plant is in good operating condition, and giving as good service as a new plant, then the question of depreciation may be entirely disregarded."

Neither Book Cost nor Original Cost is the Controlling

Factor:

Barnes Cases on Public Utility Regulation (1938)

at 433:

"The book cost of the property is perhaps the most obvious indication of the amount of property which the company is using in serving the public. The availability of book cost as evidence of the rate base must depend upon the accuracy with which the company's books have been kept. Only where the books have been kept according to a system of accounts prescribed by the commission, and where, in addition, these books have been subject to continuous inspections and audits by the Commission's staff, are figures of book cost considered reliable."

In Re Town of Thompson Falls,

(1938) P.U.R. 337 (N.S.)

The Montana Public Service Commission held that the book cost is not decisive of value, since it indicates merely the price of acquisition of the property, and not its present value.

San Diego Land & Town Co. vs. Jasper,
(1903) 189 U.S. 439
47 L. ed 892.

Mr. Justice Holmes who delivered the judgment of the Court, at page 894 L. ed, states:

"It is no longer open to dispute that under the constitution what the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public..... That is decided, and is decided as against the contention that you are to take the actual cost of the plant, annual depreciation, etc. and to allow a fair profit on that footing over and above expenses."

Depreciation:

Whitten on Valuation of Public Service Corporations
(1928) vol. 2 at page 1660:

"Depreciation may be divided into two general classes:

(1) Physical depreciation, (2) functional depreciation.

Physical depreciation is the result of deterioration due to wear or to age. It results from use, decay, and the action of the elements. Functional depreciation is the result of lack of adaptation to function. It results from changed conditions and surroundings which render the structure ill adapted to its work; from growth of the business which renders the structure inadequate or to decline of business which renders it too large; from the development of the art which makes desirable the substitution of other methods, equipment and structures. The terms inadequacy and obsolescence are often used to denote in part what is here termed functional depreciation. Physical depreciation is a constant factor; it begins as soon as the structure is exposed to the action of the elements or is put to use. Functional depreciation is fortuitous; it may come into play during the lifetime of a particular structure and it may not.

Accrued depreciation in a public utility is that loss in total service value which comes from physical deterioration or lessened adaptation to function."

See Murray v. Public Utilities Commission, supra

Whitten - 1928 ed. at pages 1718 and 1719 quotes the following from the Final Report of the Special Valuation Committee of the American Society of Civil Engineers:

"If by order or sanction of a regulating body, or by long

"continued proper custom under no regulation, a property has been maintained in normal working condition, necessarily less than new in some or all of its parts, by the replacement method, and at any given date is being valued for any public purpose and at that date shows normal conditions, all its several parts being in as good condition as could be expected, the accounts showing that always those amounts have been expended in renewals that were necessary to keep the property in normal working condition, and the fact appearing that no expenditure reasonably to be expected could put the property in better than the normal condition in which it is found, and that no unusually large expenditure is presently to be necessary for this purpose, then, in spite of the fact that there is an existing decretion in its several parts, there should be found no depreciation of valuation."

And at pages 1779 and 1780 quotes further from the said report as follows:

"Decretion or loss in service life being always present in any going property, the cost of decretion is always present. Decretion is a fact, and is independent of methods of accounting, or character of regulation, but is much dependent on character of maintenance. In determining it, one is not helped in any way by reference to the accounting methods. He must examine the property units, estimate their remaining service lives, know their elapsed service lives, the character of their past service and maintenance, and the prophecy as to future service and maintenance. To estimate the cost of decretion one must know, also, the costs or estimated reproduction costs of the property units, but the amount of the estimate and whether or not it shall be treated as depreciation of valuation may be, and very probably will be, dependent, at least in part, on methods of accounting for depreciation that have prevailed."

Whitten at page 1779 explains that the Special Committee of the American Society of Civil Engineers in its Final Report adopted the word "decretion" "to express the loss in service life, which, translated into values, is depreciation" and at page 1780 in referring to the last above quoted extract from the Final Report he states:

"This may be regarded as the highest engineering authority on what the inspection or observation method of determining 'actual depreciation' must be if the results are to be trustworthy and meet the requirements of the law."

Whitten, vol. 2 at page 1795 gives the following rules laid down by the Interstate Commerce Commission for determining depreciation for common-carrier purpose:

(1) "Depreciation is the lessening in worth of physical property due to use or other causes."

(3) m.B. (4) "Depreciation shall be determined by a consideration of observations of actual conditions of the property and mortality statistics of similar property in like use applied where practicable on the straight-line basis."

and at page 1797, re steam railroads and telephones:

"We therefore find that depreciation is the loss in service value not restored by current maintenance."

McCardle v. Indianapolis Water Co.
(1926) 272 U.S. 400,
71 L. ed 316,

The City's engineer in his estimate of the value of the Company's plant included the then cost of reproduction less a deduction of "approximately 25 per cent of estimated cost new to cover accrued depreciation".

At page 327 L. ed. Mr. Justice Butler states:

"The deduction was not based on an inspection of the property. It was the result of a 'straight line' calculation based on age and the estimated or assumed useful life of perishable elements. The commission's report indicates that the property is well planned, well maintained and efficient. Its chief engineer inspected it, and estimated its condition by giving effect to results of the examination and to the age of the property"

.....
"The testimony of competent valuation engineers who inspected the property and made estimates in respect of its condition is to be preferred to mere calculations based on averages and assumed probabilities. The deduction made in the City's estimate cannot be approved."

Book Value or Book Depreciation Should not be Taken

In West v. Chesapeake etc. Telephone Co.
(1935) 295 U.S. 662,
79 L. ed 1640,

the United States Supreme Court held that a valuation of the plant of a telephone company for rate purposes arrived at by deducting the depreciation

reserve from book cost and adding to the difference on allowance for working capital is so arbitrary as to violate the due process provision of the 14th amendment.

Mr. Justice Roberts, speaking for the Court, at pages 1650 and 1651 states:

"As already stated, the District Court condemned the method pursued by the Commission, and adopted one of its own. This consisted in deducting the company's depreciation reserve from book cost and adding to the difference an allowance for working capital. It is true that the court discussed the company's evidence as to cost of reproduction new, less depreciation, but did so only to indicate its disapproval of certain large amounts embodied in the total claimed and to reconcile the figures with its own estimate. A careful reading of the opinion leaves no doubt that all other measures of value were discarded in favor of cost less depreciation reserve.

It is clear that in a period of low prices costs incurred when the price level was much higher are not a safe guide in appraising present value. The court so conceded. The depreciation reserve was built up on the straight line theory. The company asserted that the amount of the reserve did not represent observed and accrued depreciation at the date of valuation, as much of the total consisted of funds provided in anticipation of future depreciation and obsolescence. The Court agreed and further found that on account of decreased demand for service, with consequent diminishment of obsolescence, the percentage of reserve had in recent years sharply increased. The question of going value was the subject of controversy. The court recognized that this element must be considered, but refused to make any separate allowance for it.

What the court did in fact was this: It found that book cost less actual accrued depreciation would probable give too high a figure. It sought to correct the probable error by deducting from cost the entire depreciation reserve, though conceding this exceeded actual depreciation. It felt that this large deduction would also redress any excess of cost over present value; and finally it said the result of its method would be appropriate to allow for going value.....

.....
The opinion in essence consists of the conclusion, that, all the circumstances considered, it will be fair to appraise the property at cost less depreciation reserve. This rough and ready approximation of value is as arbitrary as that of the Commission, for it is unsupported by findings based upon evidence.

For the reasons stated we cannot sustain the District Court's valuation. We have shown that the Commission's order violates the principle of due process, as the measure of value adopted is inadmissible.

PLANT BUILT FROM PROCEEDS OF PAST SURPLUSES OR EXCESSIVE PROFITS IS TO BE INCLUDED:

See: Board of Public Utility Commissioners v. N.Y. Telephone Co.

(1926) 271 U.S. 23 at 30-32,
70 L. ed. 808 at 812-813,

(referred to supra at page 2 of this brief)

In Spokane v. Northern Pacific Ry. Co.
(1909) 15 I.C.C. 376.

1 Whitten at pages 706-707,

the Interstate Commerce Commission stated that in fixing rates for the future it should not make rates for the purpose of distributing a large past accumulated surplus to the public.

Commissioner Trouty, in writing the opinion of the Commission, states:

"There is no absolute test of a reasonable rate, and the government has supplied none. During all this period the excess has gone into the property, which has gradually become more valuable, and this increased value has reflected itself in the market price of the securities of that Company. It is impossible to restore what has been improperly taken in the way of excessive rates to those persons from whom it has been received. The Government, under those circumstances, cannot lay hold on this surplus as a fund held in trust for the public."

In Grafton County Electric Lt. & Power Co. vs. State,
(1915 0) P.U.R. 1064 (N.H.)

Judge Peaslee at page 1069 states:

"It is urged by counsel as a further reason for denying the petition that the public has some vague interest in the surplus which has been accumulated, so that it may deny to the owners the full enjoyment thereof. The authorities are clear that the surplus is the property of the companies. (citing cases). Since it is their property, it cannot be taken from them directly, nor can they be deprived of it indirectly, either in whole or in part, by denying to its owners the right to use it as they could use their other property."

In Reed v China Telephone Company
1920 C P.U.R. 386,

the Main Public Utilities Commission at pages 388-389 said:

"We therefore find that for the purpose of this case the fair value of the property which the company is using in its service to the public is the sum of \$20,000. As above stated the sum which the company originally invested was \$10,000 and the balance of approximately \$10,000 consists of accumulated earnings in excess of dividends actually paid and represents an amount which, aside from the proper amount to be deducted for depreciation, could have been distributed to the stockholders in the form of dividends. Having invested the money in property and put that property in the service of the public, the company is entitled to a return thereon in exactly the same manner that it would have been entitled to a return had the money been distributed to the stockholders as dividends and then invested by the same persons through the purchase of additional stock and the same money put into the same property and the latter put to the same use. In other words, the present owners of the company having produced a property which is being used in the service of its customers, the value of that property in the yardstick which we must use in measuring the return to which the company is entitled".

In City of Erie v Public Service Commission.
(1924 D) P.U.R. 89,

Judge Kephart of the Pennsylvania Supreme Court at page 97:

"It may be the property representing this total value was secured largely from earnings received from the rate payer, but that does not change its status as private property so as to eliminate it from the rate base. It is not for that reason to be discriminated against".

WORKING CAPITAL SHOULD BE INCLUDED AS PART OF THE VALUE OF THE UNDERTAKING:

Whitten, vol. 2 at pages 1519 and 1520, states:-

"Besides the plant used for rendering public service, a utility requires working capital. This element is distinguished in accounting systems from fixed capital, the latter being represented by land, permanent structures and intangible investments.....In valuation for rate purposes, working capital takes the form rather of a reasonable allowance than of an appraised value of things found in the possession of the utility. For one thing, the specific things and items which make up working capital are impermanent and subject to wide seasonal and other fluctuations. For rate purposes working capital may be defined as the amount of capital which the investors are required to put into the business over and above

"the investment in plant and intangibles in order to cover the gap between cash expenditures in the production and delivery of service and the collection of the revenues from the sale of service".

In Ohio Utilities Company v Public Utilities Commission of Ohio.

(1925) 267 U. S. 359

69 L.ed 656

the United States Supreme Court held that in absence of evidence to the contrary, the commission cannot arbitrarily reduce the estimate of its own engineers as to the necessary working capital of a public utility for rate-making purposes.

McCardle v Indianapolis Water Co.

1926 272 U. S. 400

71 L ed. 316.

Mr. Justice Butler at page 325 L. ed. states:-

"For working capital, the Commission's chief engineer included \$102,997 to cover materials and supplies. He did not include anything to cover cash working capital. The commission adopted his total and added \$135,000 for cash, making \$237,997 in all. The testimony of the company's witnesses supports a higher figure, and there was no other evidence on the subject. The amount is low when compared with those included in other cases".

In Illinois Comm. Commission v Public Service Co. of Northern Ill.,
(1934) 4 P.U.R. (N.S.) pages 1 - 86,

the Illinois Commerce Commission at page 35 stated:

"The amount of working capital upon which a utility is entitled to earn is, in our opinion, the average amount of its actual investment in operating expenses during the year, plus necessary prepayments and working funds, including a reasonable amount to be maintained as bank balances, and the materials and supplies required for operation".

United Gas Public Service Co. v Texas.

(1938) 303 U. S. 123,

82 L. ed. 702,

Chief Justice Hughes speaking for the United States Supreme Court, summarizes (with approval) the instructions of the Court below to the jury, as follows at pages 711-712 L. ed:

"That by 'fair return' was meant that the appellant was entitled to earn a rate on the present fair value of its property which it employs for the convenience of the public 'equal to that generally being made at the same time within the same general part of the country upon investments in other business undertakings which are attended by like risks and uncertainties'. That the rate of return should be reasonably sufficient 'to assure confidence in the financial soundness of the utility and should be adequate under efficient and economical management to maintain and support its credit and enable it to raise money necessary for the proper discharge of its duties'.

That by 'fair value' was meant 'the reasonable worth of the property at this time that is being used and useful in the public service'. That by 'used and useful' was meant that it embraces all the property 'actually being used' in that service and also such property as was reasonably necessary to permit 'continuous and efficient service'.

That by 'operation expenses' was meant such expenses as were incurred in the operation of appellant's property in furnishing gas to the

"people of Laredo.

That by 'annual depreciation' was meant the amount per annum that was reasonably necessary to compensate for the wearing out and any necessary replacements and retirements of appellant's property.

That by 'reproduction cost new' was meant 'the cost to the owner under the conditions which may reasonably be expected to exist if the property were to be reproduced new'.

That by 'going value' was meant the added value of appellant's property as a whole, used and useful for serving the City, over the sum of the values of its component parts, by reason of the fact 'that it is an operating, assembled and established property, functioning with a trained personnel, a co-ordinated plant and property, with customers attached, and its business established".

(V). WHAT SHOULD BE INCLUDED IN THE RATE?

In fixing the fair rate to be charged in the future by a public utility company it is submitted that the rate so fixed should be so computed as to provide an annual gross revenue to take care of the following:-

- (1). Operating Expenses - including Taxes.
- (2). Annual Depreciation,
- (3). A Fair Return on the Value of the Undertaking.

In many of the cases the annual depreciation is regarded as part of the operating expenses.

(1). Operating Expenses and Taxes.

Pond on Public Utilities 4th ed. (1932) vol. I at page 1046:

"It is axiomatic that the expense of operation and maintenance, which is always required to furnish efficient service, must be met out of the proceeds received for the service rendered, because this expense is necessary and must be met as a condition precedent to the continued maintenance of the business and its operation necessary to furnish its service. Where this element is not properly recognized the service necessarily suffers and the plant depreciates with the result that in a comparatively short period the service becomes unsatisfactory and entirely insufficient. To enjoy satisfactory and sustained service operating and maintenance costs must be met fully and fairly".

Barnes - Cases on Public Utility Regulation.
(1938) ed. at page 620:

"The regulation of operating expenses of the independent utility presents no serious difficulties. The expense records of the past afford a presumably accurate guide to necessary allowances for the future. Changes in the general price level may require revisions in the operating expense allowance, but the essential facts are not commonly in dispute".

Board of Public Utility Commissioners v N.Y. Telephone Co.
(1926) 271 U. S. 23,
70 L.ed. 808,

Mr. Justice Butler, at page 812 L. ed., states:
"The Company is entitled to just compensation and,

"to have the service, the customers must pay for it. The relation between the company and its customers is not that of partners, agent and principal, or trustee and beneficiary. The revenue paid by customers for service belongs to the Company. The amount, if any, remaining after paying taxes and operating expenses, including the expense of depreciation is the company's compensation for the use of its property".

In Fort Worth Gas Co. v Fort Worth,
(35 Fed.(2d) 743,
(1930 C) P.U.R. 203,

it was stated:-

"It must be determined whether the rates complained of are yielding, and will yield, over and above the amount required to pay taxes and proper operating charges, a sum sufficient to constitute just compensation for the use of the property employed in furnishing the service. Such a rate is a reasonable rate of return, and must be made on the value of the property at the time of the investigation and for a reasonable time in the future".

In Galveston Electric Co. v Galveston,
(1922), 258 U. S. 388,
66 L ed. 678,

Mr. Justice Brandeis, speaking for the Court, at pages 684-685 L. ed.,

states:

"The remaining item as to which the master and the court differed relates to the income tax. The company assigns as error that the master allowed, but the court disallowed, as a part of the operating expenses for the year ending June 30, 1920, the sum of \$16,254, paid by the company during that year for Federal income taxes. The tax referred to is presumably that imposed by the Act of February 24, 1919, Chap. 18, ss 230-238, 40 Stat. at L 1057, 1075-1080, Comp. Stat. ss 6371, a, 6336 1/8 nn-6336 1/8 rr, which, for any year after 1918, is 10 per cent of the net income. In calculating whether the 5 cent fare will yield a proper return, it is necessary to deduct from gross revenue the expenses and charges; and all taxes which would be payable if a fair return were earned are appropriate deductions. There is no difference in this respect between state and Federal taxes, or between income taxes and others. But the fact that it is the Federal corporate income tax for which deduction is made must be taken into consideration in determining what rate of return shall be deemed fair. For, under s. 216, the stockholder...."

In Re Detroit Edison Company,
(1936) 16 P.U.R. (N. S), 9,

The Michigan Public Utilities Commission at page 22, states:

"It this appears that out of every dollar in gross revenue the company took in, in 1935, it was compelled to pay 12 cents in taxes. There are the taxes which have to be paid by the Company..... During the past two or three years the Federal Government has passed laws imposing many additional taxes upon Utility companies in common with all other business concerns.....

In addition to the foregoing new taxes, a recent law compels the stockholders of this and other corporations to pay a second normal tax on the dividends received from the corporations in which they are stockholders. The corporation first pays the regular corporation or normal tax. Then a second normal tax is paid by the stockholder on the dividends he receives. Up until recently the dividends received by stockholders from a corporation were exempt from the payment of the normal income tax. The Courts held that such fact increased the value of their dividends and should be taken into consideration by a Commission in fixing a rate of return to be allowed upon the fair value of the utility. It would, therefore, appear that under the existing law which taxes said dividends, it would be the duty of a commission to allow a somewhat greater rate of return because of the fact that the dividends received by the stockholders are now subject to the normal income tax".

West Ohio Gas Co. v. Public Utilities Comm. of Ohio,
(1935) 294 U.S. 63,
79 L. ed. 761,

Mr. Justice Cardozo, speaking for the Court, at page 767 L. ed., states:

"The Company made claim to an allowance for 'unaccounted for gas' which is gas lost as a result of leakage, condensation, expansion or contraction. There is no dispute that a certain loss through these causes is unavoidable, no matter how carefully the business is conducted.....The Company basing its claim on its proved experience, reported the average loss at 9% per annum. The commission fixed the allowance at 7%, thereby reducing the operating expenses by \$3,800 a year.....Accepting the loss as proved, the Commission refused to allow it for more than 7% upon the ground that with proper care of the system the loss would have been less. A public utility will not be permitted to include negligent or wasteful losses among its operating charges. The waste or negligence, however, must be established by evidence of one kind or another, either direct or circumstantial. In all the pages of this record, there is neither a word nor a circumstance to charge the management with fault.....There is not even the shadow of a warning to the company that fault was imputed and that it must give evidence of care. Without anything to suggest that there was such an issue in the case, the commission struck off 2%.....This was wholly arbitrary."

And at page 769 L. ed. in referring to other claims of the company for operating expenses, he states:

"In the absence of a showing of inefficiency or improvidence, a court will not substitute its judgment for theirs as to the measure of a prudent outlay."

And at page 770 L. ed. he says:

"The company made claim to an allowance of the expenses of the rate litigation amounting in all to about \$30,000, to be spread in equal parts over a term of five years, the duration of the ordinance.....In the absence of any challenge of their necessity or fairness, we must view them as they were accepted by the triers of the facts. Thus viewing them, we think they must be included among the costs of operation in the computation of a fair return."

Ohio Associated Telephone Co. v. Geiger et al.
(1933 E) P.U.R. 491.

The U. S. district Court of Ohio held that in the absence of records of actual payments made by a utility company for rate case expenses, the allowance therefor may be fixed by the court or commission by an exercise of fair judgment.

See Also: Ry. Commissioners v. Illinois Pipe Line Co.
Vol. 5 P.U.R. Digest at page 4117.

(2) Annual Depreciation.

Whitten, vol. 2 at page 1817:

"The cost of utility service includes as one of its elements the wasting or diminution of the intrinsic values of the property used in the rendering of the service. Such wasting or diminution may be caused by physical wear, decay through exposure to the elements, changes in operating requirements, the competition of more efficient equipment, or other causes of physical deterioration or functional depreciation. Whatever the cause, if the lessening of value is an actual and necessary result of, or incident in, the use of utility property in public service, the amount accruing within a given year is the annual depreciation, and this is a legitimate and necessary charge against those who enjoy the service during that period."

In Board of Public Utility Comm. v. N. Y. Telephone Co.
(1926) 271 U.S. 23,
70 L. ed. 808,

Mr. Justice Butler, speaking for the United States Supreme Court, held that a rate prescribed by the New Jersey Board of Utility Commissioners was confiscatory because it did not cover the full amount of depreciation currently accruing, as found by the Board, although the company in past years had collected an excessive amount for that purpose which was held in depreciation reserved

See: the judgment of Butler, J. as quoted on pages 2 and 3 of this brief.

Smith v. Illinois Bell Telephone Co.
(1930) 282 U.S. 133,
75, L. ed 255.

Chief Justice Hughes, who delivered the judgment of the Court, at page 268 L. ed., states:

"while it has been held by this court that property paid for out of moneys received for past services belongs to the Company, and that the property represented by the credit balance in the reserve for depreciation cannot be used to support the imposition of a confiscatory rate (Public Utility Comms. vs. New York Telephone Co. 271 U.S. 23, 70 L. ed 808, 46 S. Ct. 363), it is evident that past experience is an indication of the company's requirements for the future. The recognition

Whitten
p 1817

"of the ownership of the property represented by the reserve does not make it necessary to allow similar accumulations to go on if experience shows that these are excessive".

United Railway and Electric Co. v West.

(1930) 280 U.S. 234 at 253-254,
74 L. ed. 390 at 410-411,

Mr. Justice Sutherland, speaking for the Supreme Court of U. S.

at pages 410-411 L. ed. states:

"The allowance for annual depreciation made by the commission was based upon cost. The court of appeals held that this was erroneous and that it should have been based upon present value. The Court's view of the matter was plainly right. One of the items of expense to be ascertained and deducted is the amount necessary to restore property worn out or impaired, so as continuously to maintain it as nearly as practicable at the same level of efficiency for the public service. The amount set aside periodically for this purpose is the so-called depreciation allowance. Manifestly this allowance cannot be limited by the original cost, because, if values have advanced, the allowance is not sufficient to maintain the level of efficiency. The utility 'is entitled to see that from earnings the value of the property invested is kept unimpaired, so that at the end of any given term of years the original investment remains as it was at the beginning'. Knoxville v Knoxville Water Co. 212 U. S. 1, 13, 14, 53 L. ed. 371, 380, 29 Sup. Ct. Rep. 148. This naturally calls for expenditures equal to the cost of the wornout equipment at the time of replacement; and this, for all practical purposes, means present value. It is the settled rule of this court, that the rate base is present value, and it would be wholly illogical to adopt a different rule for depreciation. At the supreme court of Michigan, in Michigan Pub. Utilities Commission v Michigan State Teleph. Co. 228 Mich. 658, 666, 200 N.W. 749, has aptly said: 'if the rate base is present fair value, then the depreciation base as to depreciable property is the same thing. There is no principle to sustain a holding that a utility may earn on the present fair value of its property devoted to public service, but that it must accept and the public must pay depreciation on book cost or investment cost regardless of present fair value. We repeat, the purpose of permitting a depreciation charge is to compensate the utility for property consumed in service, and the duty of the commission, guided by experience in rate making, is to spread this charge fairly over the years of the life of the property'. And see Missouri ex rel. Southwestern Bell Teleph. Co. v Public Serv. Commission 262 U. S. 276, 288, 67 L. ed. 981, 985, 31 A.L.R. 807, 43 Sup. Ct. Rep. 544, Georgia R. & Power Co. v Railroad Commission, 262, U.S. 625, 633, 67 L. ed. 1144, 1148, 43 Sup. Ct. Rep. 680."

(3). Fair Net Return.

This subject is separately dealt with in the pages immediately following.

(VI) FAIR RETURN:

It is submitted that rates which are sufficient barely to be above the line of confiscation are not necessarily high enough to be fair, reasonable or equitable.

Governmental or state regulation was not inaugurated or maintained primarily or merely to cut down the profits of public utility companies, but for the purpose of ensuring that the public should not pay exorbitant or undue prices for that service.

Rates to the public for service may be fair and reasonable to the public for the class and type of service rendered and yet yield the company a rate of return considerably above the confiscation rate.

Wilson, Herring and Eutsler on Public Utility
Regulation (1938)

at pages 95 and 96:

"The obligation of charging just and reasonable rates is an obligation to charge rates not above a maximum point set by the value of the service to the user and not below a minimum point set by the cost of producing the service. Within the zone between these two lies the area of reasonableness. Practically, therefore, a just and reasonable rate is one that returns to the utility an amount equal to, and usually greater than, the cost of producing the service and that provides the users a service at an amount not more than, and usually less than, the value of the service.

This concept of just and reasonable rates has been described in a judicial opinion in the following words:

On the one hand a just and reasonable rate can never exceed, perhaps can rarely equal, the value of the service to the consumer. On the other hand, it can never be made by compulsion of public authority so low as to amount to confiscation. A just and reasonable rate must ordinarily fall somewhere between these two extremes so as to allow both sides to profit by the conduct of the business and the improvements of methods and increase of efficiency. Justice to the consumer, ordinarily, would require a rate somewhat less than the full value of the service to him; and justice to the company would, ordinarily, require a rate above the point at which it would become confiscatory. To induce the investment and continuance of capital there must be some hope of gain commensurate with that realizable in other business; the mere assurance that the investment will not be confiscated would not suffice."

The case referred to is:

Public Service Gas Co. v Board of Public Utility Commissioners.

87 Atl. 651,
95 Atl. 1079

Banton v Belt Line Corporation.

1925 268 U. S. 413,
69 L ed. 1020.

Mr. Justice Butler, speaking for the U. S. Supreme Court, at
pages 1026 and 1027 L. Ed. states:

"A commission or other legislative body, in its discretion, may determine to be reasonable and just a rate that is substantially higher than one merely sufficient to justify a judicial finding in a confiscation case that it is high enough to yield a just and reasonable return on the value of the property used to perform the service covered by the rate. The mere fact that a rate is non-confiscatory does not indicate that it must be deemed to be just and reasonable. It is well known that rates substantially higher than the line between validity and unconstitutionality properly may be deemed to be just and reasonable, and not excessive or extortionate,"

In Columbus Gas & Fuel Co. vs Columbus.
(1927 C) P.U.R. 639,

the Court stated:

"There is a well-marked distinction between a return non-confiscatory in character, and one which is fair in a commercial and economical sense. A rate of return may be all sufficient in fulfilling the demands of the Fourteenth Amendment to the Constitution of the United States, and at the same time fail in amount to encourage and justify the operation of a utility business under that degree of maximum efficient service to which the public is entitled. The former is a purely judicial question, while the latter is essentially legislative."

In Waukesha Gas & El. Co. v Wisconsin Railroad Commission.
(1923 E) P. U. R. 634,

at page 640 of the judgment, it is stated:

"The rate should be in the language of the statute 'just and reasonable'. In other words, not so low as to approach the line of confiscation nor so high as to be unjust and oppressive. A just and reasonable rate need not approach either line."

Canada Southern Ry. Co. v. International Bridge Co.
L. R. 8 App. Cases 723,

Lord Selborne at pages 731-732:

"It certainly appears to their Lordships that the principle must be, when reasonableness comes in question, not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged. That is the only thing he is concerned with. They do not say that the case may not be imagined of the results to a company being so enormously disproportionate to the money laid out upon the undertaking as to make that of itself possibly some evidence that the charge is unreasonable, with reference to the person against whom it is charged. But that is merely imaginary. Here we have got a perfectly reasonable scale of charges in everything, which is to be regarded as material to the person against whom the charge is made. One of their Lordships asked Counsel at the bar to point out which of these charges were unreasonable. It was not found possible to do so. In point of fact, every one of them seems to be, when examined with reference to the service rendered and the benefit to the person receiving that service, perfectly unexceptionable, according to any standard of reasonableness which can be suggested. That being so it seems to their Lordships that it would be a very extraordinary thing indeed, unless the Legislature had expressly said so, to hold that the persons using the bridge could claim a right to take the whole accounts of the company, to dissect their capital account, and to dissect their income account, to allow this item and disallow that, and, after manipulating the accounts in their own way, to ask a Court to say that the persons who have projected such an undertaking as this, who have encountered all the original risks of executing it, who are still subject to the risks which from natural and other causes every such undertaking is subject to, and who may possibly, as in the case alluded to by the learned Judge in the Court below, the case of the Tay Bridge, have the whole thing swept away in a moment, are to be regarded as making unreasonable charges, not because it is otherwise than fair for the railway company using the bridge to pay those charges, but because the bridge company gets a dividend which is alleged to amount, at the utmost, to 15 per cent. Their Lordships can hardly characterise that argument as anything less than preposterous".

See also: Cotting v. Godard,
(1901) 183 U.S. 79,
46 L. ed. 92 at 103.

It is to be observed that neither the Public Utilities Commission under the Pipe Line Act nor this Commission under the Order-in-Council appointing it is merely empowered to ascertain, fix or order the minimum non-confiscatory rates.

Rather the Utilities Board in fixing rates under The Pipe Line Act is instructed to "impose as little hardship as possible upon individuals" and this Commission by the Order-in-Council is directed to inquire into and report upon "fair and equitable rates".

It is submitted that the present charge of 15 cents per barrel for gathering and transportation is fair and reasonable to the customer.

In this regard reference is made to the report of Ford, Bacon & Davis - page 27 - put in as Exhibit "96".

It is further submitted that the evidence does not disclose any immediate prospect of increased business but rather indicates that the daily quantity of oil for transportation through the Company's pipe line will be less due to the coming in of other fields, the limited market and Conservation Board Orders.

In West Ohio Gas Co. v. Public Utilities Comm. of Ohio (No. 2)
(1935) 294 U.S. 79,
79 L. ed. 773,

the United States Supreme Court held that the adoption by a state utilities commission of a single year as an exclusive test in ascertaining the gross income and operating expenses of a gas company, for the purpose of fixing rates, without considering later years as to which the rate is to be effective is an arbitrary and unfair restriction.

At page 777 L. ed. Mr. Justice Cardozo, speaking for the Court,

states:

"We are not unmindful of the argument urged by counsel for the commission that the effect of lower prices may be to swell the volume of the business, and by thus increasing revenues enhance the ultimate return. Upon the record as it comes to us, this is guesswork, and no more. There has been no attempt to measure the possible enhancement by appeal to the experience of other companies similarly situate or by any other line of proof. Present confiscation is not atoned for by merely holding out the hope of a better life to come."

The pipe line business - particularly the quantity - is bound to fluctuate seasonally in each year as well as from year to year.

Willson, Herring and Butsler, on Public Utility Regulation (1938).

at page 166:

"The Building up of reserves for known and unforeseen contingencies, and to produce a regular flow of dividends, should be permitted in the rate of return. Adequate provision should be made in operating expenses for the depreciation of plant and equipment, since it is manifestly equitable that the investor is entitled either to have his capital returned to him or to have his equity maintained."

The length of the life of the Turner Valley field is purely conjectural and the risk of the company's present pipe line in that field is attended by a still more definite and probable risk in that the annual amount of petroleum to be transported by the Turner Valley pipe line is bound to be drastically decreased as wells in other Alberta areas are brought into production - that other numerous and substantial wells will be brought in is a probability - so that the limited available market will be cut down and still further decreased so far as the share thereof that Turner Valley will be permitted to supply.

The evidence discloses that the widening of the market by expensive pipe lines to the Pacific Coast or to the East is extremely remote, if not economically impossible.

Even the present limited market for Alberta oil is not definitely assured. A substantial portion of it may be lost if oil producers in the United States should see fit to reduce prices to the point where they would absorb the tariff restrictions.

The lowering of the tariff is a risk that must be regarded as a factor to be taken into consideration.

Mr. Hill's evidence and the report of Ford Bacon and Davis disclose that a Montana pipe line constructed in 1934 has since ceased to operate, due to loss of market.

Willecox v. Consolidated Gas Co.,
(1909) 212 U.S. 19,
53 L. ed. 382.

Mr. Justice Peckham, speaking for the Court at page 398

L. ed. states:

"There is no particular rate of compensation which must, in all cases and in all parts of the country, be regarded as sufficient for capital investment in business enterprises. Such compensation must depend greatly upon circumstances and locality; among other things, the amount of risk in the business is a most important factor, as well as the locality where the business is conducted, and the rate expected and usually realized there upon investments of a somewhat similar nature with regard to the risk attending them. There may be other matters which, in some cases, might also be properly taken into account in determining the rate which an investor might properly expect or hope to receive and which he would be entitled to without legislative interference. The less risk, the less right to any unusual returns upon the investments. One who invests his money in a business of a somewhat hazardous character is very properly held to have the right to a larger return, without legislative interference, than can be obtained from an investment in government bonds or other perfectly safe security."

In Re Baker Natural Gas Utility,
(1921 E.) P.U.R. 609,

at page 627 it is stated:

"(12) The decided cases justify a higher rate of return for natural gas utilities than for any other utilities because of the relatively short period for capital investment therein, and the usual hazards attending the operation and this notwithstanding these factors are given weight in the allowances for depreciation and depletion, which allowances must be borne by the rates charged for the service. We know no sound reason for denying the application of these decisions to this case, to the extent of three or four per cent beyond the rate of return found fair for other investments, having regard to all the elements comprehended in a "fair" return and reasonable rates. (Lien v. Superior Electric Light and Waterworks 14 M.U.R. - 1 decided February 23, 1921) Eight per cent seems now to be the minimum for all ordinary public utility investments in our jurisdiction (In re Missoula St. Rlwy. Co. 14 M.U.R. - decided Dec. 7, 1920) and eleven or twelve per cent cannot be too much for a capital outlay of many thousands of dollars in materials and appliances which may be reduced in value to zero in the twinkling of an eye."

It should be noted that the pipe line company herein is not in the position of the great majority of public utility companies and common carriers, in that:

- (1) It is not in a position either by its own efficiency, advertising, or rates or other efforts on its part to increase or build up or even maintain its load.
- (2) The amount of business or traffic it will or can obtain is wholly governed by:
 - (a) the life of the Turner Valley field,
 - (b) the capacity to which the owners of existing wells may see fit to operate them,
 - (c) the number of wells that other parties may see fit to drill,
 - (d) the extent to which the Conservation Board may regulate, and control the amount of output of, present and future wells,
 - (e) the limited nature and extent of the market capable of being supplied by Alberta petroleum,

- (f) the seasonal nature of the market - winter and summer conditions,
- (g) the evident probability of the limited market being supplied by, or share with, new local fields,
- (h) the new fields being of such a nature that petroleum production will likely be obtained at a lesser and more economical depth.
- (i) the available market - western - being subject to fluctuation due to crop and weather conditions,
- (j) tariff conditions and foreign competition.

All of these factors serve to make the hazard and risk of the Calgary-Turner Valley pipe line business far greater than those attending the natural gas distribution business in the Province, and also greater than those of the pipe line business in the United States and also far greater than those incidental to the ordinary utilities' business.

If and as the Turner Valley producing area is widened the Company is in effect committed to extend thereto its system in spite of, and with, the risks just referred to, and whether or not the pipe line will be continuously used to its capacity.

(VII)

AMERICAN DECISIONS APPLICABLE.

The American constitution provides that no person can be deprived of his property without just compensation and due process of law.

Southern Iowa Electric Co. v. Chariton,
(1921) 255 U.S. 539,
65 L. ed 764,

Chief Justice White in delivering the judgment of the United States Supreme Court at page 775 L. ed., states:

"Although the governmental agencies having authority to deal with the subject may fix and enforce reasonable rates to be paid public utility corporations for services by them rendered, that power does not include the right to fix rates which are so low as to be confiscatory of the property of such corporations."

In West v. Chesapeake etc. Telephone Company,
(1935) 295662,
79 L. ed. 1640 at

Mr. Justice Roberts at pages 1646-1647 L. ed. stated:

"The established principle is that as the due process clauses (Amendments Five and Fourteen) safeguard private property against a taking for public use without just compensation, neither Nation nor State may require the use of privately owned property without just compensation. When the property itself is taken by the exertion of the power of eminent domain, just compensation is its value at the time of the taking. So, where by legislation prescribing rates or charges the use of the property is taken, just compensation assured by these constitutional provisions is a reasonable rate of return upon that value. To an extent value must be a matter of sound judgment, involving fact data."

In Smyth v. Ames,
(169 U.S. 466,
42 L. ed. 819,

the Court held that a railroad corporation is a person within the 14th Amendment to the U.S. Constitution which forbids a state to deprive any person of property without due process of law and that

for transportation by railroad that will deprive the carrier of just compensation, is repugnant to the 14th Constitutional Amendment, as depriving the carrier of his property without due process of law.

It is submitted that the Public Utilities Board of Alberta in fixing rates for pipe line carriers under the Alberta Pipe Line Act is subject to the like restriction as that of the States in the American Union under the 14th Amendment.

Section 9 of the Pipe Line Act merely empowers the Board to make orders,

"fixing the rates for carriage through any pipe line."

While the provincial legislature may have the legislative power to confiscate and take away the property of a subject without complete compensation in any case such an intention should never be imputed to it unless it has definitely said so in clear, unequivocal and unmistakable terms and this, a fortiori, applies where a power is conferred on a Board or Commission.

Furthermore, the Order-in-Council appointing the Royal Commission expressly states that the Commission is,

"to make inquiry into the matters hereinafter mentioned and to report thereon:

.....

(d) the cost of gathering, handling, and transporting in Alberta of crude petroleum.....and without limiting the generality of the foregoing:

- (1) the rates charged for gathering, handling and transporting of crude petroleum by pipe-line or otherwise from Turner Valley to Calgary in the said Province, and what the fair and equitable rates for such gathering, handling and transporting should be."

And subsection 2 of section 9 of The Pipe Line Act specifically provides that the Public Utilities Board in making its orders or regulations shall "impose as little hardship as possible upon individuals."

In Colonial Sugar Refining Co. v. Melbourne Harbour Trust Commissioners
(1927) 96 L.J. P.C. 74,

Lord Warrington, speaking for the Judicial Committee, at page 82 states:

"The Board is guided by the well-known principle that a statute should not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms."

Attorney General v. Horner,
(1884) 54 L.J. Q.B. 227 (C.A.)

Brett, M.R. at page 232:

"It is, however, a proper rule of construction that an Act of Parliament is not to be construed as interfering with or injuring any person's rights without compensation unless it cannot be reasonably construed in any other way."

Maxwell on The Interpretation of Statutes,
7th ed. at page 245:

"It is presumed, where the objects of the Act do not obviously imply such an intention, that the Legislature does not desire to confiscate the property, or to encroach upon the right of persons, and it is therefore expected that, if such be its intention, it will manifest it plainly, if not in express words, at least by clear implication and beyond reasonable doubt."

See also: International Ry. Co. v. Niagara Parks Comm.
(1937) 3 All E.R. 181 (P.C.)

Lord Macmillan at page 188 as quoted on page 8 of this brief.

In Commissioner of Public Works v. Logan.
(1903) A.C. 355 (P.C.)

Lord Davey, at page 363 states:

"Their Lordships are also influenced by the consideration that the effect of the appellant's construction would be to take away the respondent's property without any compensation. Such an intention should not be imputed to the Legislature unless it be expressed in unequivocal terms. This principle has frequently been recognized by the Courts of this country as a canon of construction, and was approved and acted on by Lord Watson in delivering the judgment of this Board in *Western Counties Ry. v. Windsor & Annapolis Ry.*, 7 App. Cas. 178, at p. 188."

See also: Nelson v. P.G.E. Ry.
(1918) 1 W.W.R. 597.

In Re Stronach,
(1927-28) 61 O.L.R. 636 (A.D.)

Mr. Justice Grant, who delivered the unanimous judgment of the Court at page 641 quotes with approval the following statement of the law:

"Statutes which encroach on the rights of the subject, whether as regards person or property, are similarly subject to a strict construction in the sense before explained. It is a recognized rule that they should be interpreted, if possible, so as to respect such rights. It is presumed, where the objects of the Act do not obviously imply such an intention, that the Legislature does not desire to confiscate the property, or to encroach upon the right of persons; and it is therefore expected that if such be its intention, it will manifest it plainly, if not in express words, at least by clear implication, and beyond reasonable doubt."

Furthermore, the Pipe Line Act and the authority to ascertain a fair rate should not be given a retroactive effect.

In The Cana. Northern Ry. etc. v. the King
(1922) 64 S.C.R. 264,
(affirmed 93 L.J.P.C. 18)

Mr. Justice Brodeur, at page 276, states:

"It is contended that the amendment has a retroactive effect, but the declaration is not made in terms sufficiently wide to be construed retroactively. If there was some doubt, the doubt should be solved against the retrospective effect; and besides, in this case, it would disturb vested rights."

See also: Toronto General Trusts Corp. v. Gooderham,
(1936) S.C.R. 149, Davis J. at pages 161-162. X

Schmidt v. Ritz,
(31 S.C.R. 602 at 605.

(Vlll) S U M M A R Y:

In the light of the foregoing, it is submitted:

(1) That any profits made by the pipe line company, or losses sustained by it, in the past should not be taken into account in now arriving at a rate base upon which rates for the future are to be formulated.

Board of Public Utility Commissioners v. N.Y.
Telephone Co.

(1926) 271 U.S. 23 at 30-32,
70 L. ed. 808.

Los Angeles Gas & El. Corp. v. Rd. Commission
of California,

(1933) 289 U.S. 287,
77 L. ed. 1180 at 1197.

Brief: pages 2 to 4.

(2) Any depreciation reserves heretofore built up should not be deducted from the rate base upon which rates for the future are to be fixed.

Board of Public Utility Commrs. v. N.Y. Telephone
Co. (supra)

Brief: page 2.

(3) For the purpose of arriving at a fair rate of return by the pipe line company under regulation, which is now being applied for the first time, the present fair actual value of the Company's system as a going concern used and useful in the business should be arrived at.

Willcox v. Consolidated Gas Co.

212 U.S. 19,
53 L. ed. 382 at 395 and 399.

Edinburgh St. Tramways v. Edinburgh Corp.

(1894) A.C. 456.

Brief: pages 5 and 6.

(4) The present fair actual value consists of:

- (a) Present market value of the lands,
- (b) Present reproduction cost new of the physical structures, including overhead charges, less observed depreciation,
- (c) Going value,
- (d) Working capital,

City of Toronto v. Toronto Ry.
(1925) L.J.P.C. 25 at 32.

Denver v. Denver Union Water Co.
(1918) 246 U.S. 178,
62 L. ed. 649 at 661.

Des Moines Gas Co. v. Des Moines,
(1915) 238 U.S. 153,
59 L. ed. 1244 at 1251.

Los Angeles Gas & El. Corp. v. Rd. Comm.
of California.
(1933) 289 U.S. 28,
77 L. ed. 1180 at 1197.

National Telephone Co. Ltd. v. Postmaster-
General,
(1913) 39 T.L.R. 190,

Ohio Utilities Co. v. Public Utilities Comm.
(1925) 267 U.S. 359,
69 L. ed. 656 at 659.

Whitten vol. 2 at pages 1519 and 1520.

McCardle v. Indianapolis Water Co.
(1926) 272 U.S. 400,
71 L. ed. 316 at 325.

Brief: pages 7 to 26.

(5) In arriving at a rate base the book costs can only be considered reliable where they have been kept according to a system of accounts prescribed by a regulatory body and where in addition those books have been subject to continuous inspections and audits by the staff of the regulatory body.

Brief: pages 17, 18, 19 and 20.

(6) Overhead includes engineering, administration and legal fees, and insurance, taxes and interest, during construction.

Oldham Ashton etc. Tramway v. Ashton Corp.
(1921) 90 L.J.K.B. 828.

(7) 12% to 15% of the physical reproduction cost new is a fair amount to be allowed for overhead incurred during construction.

Des Moines Gas Co. v. City of Des Moines,
(1915) 238 U.S. 153,
59 L. ed. 1244,

Whitten vol. 2 at page 1107.

Brief: pages 9, 16, 17, 18.

(8) In arriving at the present value of the plant a deduction from the reproduction cost new should be made for accrued or actual physical depreciation and this should be arrived at by actual observance and inspection of the property by competent engineers. In other words, the deduction should be for actual observed physical depreciation.

McCardle v. Indianapolis Water Co.
(1926) 272 U.S. 400,
71 L. ed. 316 at 327.

Brief: pages 20 to 22.

(9) Going value is different from good will or franchise value, but is rather the difference between the value of the "bare bones" of the plant and a plant organized and doing business as a going concern - an established business.

Los Angeles Gas & El. Corp. vs. Rd. Comm. of California,
(1933) 289 U.S. 28.
77 L. ed. 1180 at 1196 and 1197.

Brief: pages 10, 11, 12a and 27.

(10) As it is the present actual value of the plant that is to be

taken, the question as to whether it was constructed out of past profits, surpluses or depreciation reserves is immaterial and of no consequence in arriving at the rate base.

Board of Public Utility Commrs. v. N.Y. Telep.
(1926) 271 U.S. 23 at 30-32.
70 L. ed. 808 at 812-813.

Brief: pages 2, 23 and 24.

(11) In the absence of evidence to the contrary, the estimate of the company's engineers as to the amount of working capital required should be taken.

Whitten, vol. 2 at pages 1519 and 1520.

Ohio Utilities Co. v. Pub. Utilities Comm. of Ohio,
(1925) 267 U.S. 359,
69 L. ed. 656.

Brief: pages 24 and 25.

(12) The Rate Base should include and provide for:

- (a) Operating and administration expenses, including taxes,
- (b) Annual depreciation sufficient to compensate for wearing out and any necessary replacements and retirements of the company's property,
- (c) An amount to cover the company's expenses of and incidental to the inquiry, the same to be amortized over 5 or 6 years.
- (d) A fair annual return on the present value of the property.

Board of Public Utility Commissioners v. N.Y. Telephone Co.
(1926) 271 U.S. 23,
70 L. ed. 808 at 812.

Brief: pages 28 to 33.

(13) A fair return should take into consideration the nature of

the business, the risk and hazards, the rate of return in similar businesses or allied businesses.

Willcox v. Consolidated Gas Co.
(1909) 212 U.S. 19,
53 L. ed. 382 at 398.

Brief: pages 38 to 41.

(14) Rates merely sufficient to make the rate of return barely above the line of confiscation are not necessarily fair, reasonable and equitable but while they should, in any case, render a return above that line they should also be commensurate with, and have relation to, the value of the service to the persons served.

Banton v. Belt Line Corporation,
(1925) 268 U.S. 413,
69 L. ed. 1020 at 1026 and 1027.

Brief: pages 34 to 37.

(15) The law in this Province presupposes rates fair, reasonable and equitable, and not confiscatory.

Brief: pages 42 to 46.

(16) The risks and hazards attending the oil pipe line business in Turner Valley are far greater than those surrounding the distribution and sale of natural gas.

Brief: pages 40 and 41.





Of Counsel for The Royallite Oil Co. Ltd.

